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No. 96-1829

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF MONTANA, MARY BRYSON, BIG HORN COUNTY, and MARTHA FLETCHER,
Petitioners,

v.

CROW TRIBE OF INDIANS and UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES, JOINED BY THE MULTISTATE TAX COMMISSION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Crow Tribe and the United States have an equitable claim to taxes paid by a third party to Montana and Big Horn County.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials

throughout the United States, have a compelling interest in legal issues that affect state and local governments.[1] *Amicus* Multistate Tax Commission, the official administrative agency of the Multistate Tax Compact, is vitally interested in legal issues affecting the ability of its member States to devise effective and innovative tax policies. All *amici* have an especially compelling interest in legal issues involving federal common law remedies for state taxes which violate federal law.

The issue in this case—whether a federal court can order a State and a local government to "disgorge" to the United States and an Indian Tribe a tax long since collected from a third party—is of fundamental importance to *amici* and their members. Every State has created a remedial scheme which, to protect the governmental interest in sound fiscal planning, is "necessarily designed to operate according to established rules." *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part). The Ninth Circuit's holding that Montana and Big Horn County are required to pay over to the Tribe taxes collected from a third party many years ago would not only have dire consequences in this case, it would set a highly disruptive precedent.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in the resolution of the case.

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

Amici adopt petitioners' statement.

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that the Crow Tribe and the United States have an equitable claim to the taxes paid by Westmoreland Resources to Montana and Big Horn County. This ruling is a disturbing and dangerous departure from this Court's longstanding recognition of "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Fair Assessment In Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981). The court of appeals' holding is, moreover, totally unsupported by precedent and unnecessary. *Amici* respectfully urge the Court to reverse the judgment below.

1. The equitable claim of the Tribe and the United States—that the State of Montana and Big Horn County be ordered to "disgorge" taxes paid by a third-party taxpayer that has waived its claim for a refund—seeks extraordinary judicial intervention in an area in which the courts have long exercised the utmost restraint. Under settled common law principles, even when the taxpayer itself brings a claim to recover taxes it has paid, the mere fact that "the tax authority collected money to which it was not entitled" is not a sufficient basis for a court to order restitution. 3 George E. Palmer, *The Law of Restitution* § 14.20, at 246 (1978).

The collection of an unconstitutional or illegal tax by a governmental entity thus does not establish that the entity has been unjustly enriched, even at the expense of the taxpayer. In adjudicating taxpayer assumpsit actions, common law courts relied on equi-

table principles which acknowledged the substantial governmental interest in avoiding the disruption of the State's fiscal planning. The case for applying those principles is even stronger here, where a non-taxpayer seeks to compel governmental entities to pay over to it taxes collected from a third-party taxpayer with whom it lacked any fiduciary relationship and the taxpayer had plain and adequate state law remedies.

The "disgorgement" remedy sought by the Crow Tribe and the United States is unnecessary as well as highly disruptive. While the Tax Injunction Act ordinarily prevents federal courts from awarding declaratory or injunctive relief to state taxpayers, Indian Tribes are not subject to this bar. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470-75 (1976). The Tribe therefore could have filed suit in federal court to enjoin the State from collecting the tax upon its enactment. The availability of injunctive relief, which the Tribe could have sought immediately upon the taxes' enactment rather than waiting three years, provides additional reason to reverse the judgment of the court of appeals.

2. The court of appeals' order directing "the State and County to disgorge the improperly collected taxes," Pet. App. 12a, to the Crow Tribe and the United States is unprecedented. The court offered no legal authority to support its extraordinary ruling, either in the per curiam opinion that is the subject of Montana's petition for certiorari, or in its three earlier rulings in this case. Moreover, the court of appeals' reliance on its conclusion in *Crow II* "that the taxes had at least some negative impact on the coal's marketability," Pet. App. 100a, is patently insufficient to sustain its judgment awarding respondents the $58.2 million in taxes paid by Westmoreland (with the possible additional award of pre-judgment

interest). Nor do any of the cases cited by the United States and the Tribe support the court of appeals' extraordinary ruling.

3. The Ninth Circuit's "disgorgement" remedy cannot be justified as necessary to deter States from enacting illegal taxes. Montana, like other States, provides taxpayers with a refund remedy and the Tribe could have sought an injunction against the imposition of the taxes at the time they were enacted. Both the taxpayer and the Tribe thus had available adequate procedures for challenging the taxes which would have fully vindicated federal law. Sanctioning a disgorgement remedy, with all of the disruption it entails, will only serve to unduly deter Montana and other States in the exercise of their legislative authority. Moreover, the holding of the court of appeals poses a serious threat to the federal system by providing a foundation for other suits by the United States against States for "disgorgement" of illegal taxes and for analogous suits by States against the Federal Government. The judgment of the court of appeals should therefore be reversed.

ARGUMENT

THE TRIBE AND THE UNITED STATES HAVE NO EQUITABLE CLAIM TO THE TAXES PAID BY A THIRD PARTY TO MONTANA AND BIG HORN COUNTY

The Ninth Circuit's assertion of federal judicial power to create an equitable claim in favor of the Tribe and the United States to recover taxes long since paid by a third party to Montana and Big Horn County constitutes a highly disruptive departure from this Court's longstanding recognition of "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding

cases that affect such systems." *Fair Assessment In Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981). Moreover, the court of appeals' holding that "the Tribe state[s] a claim for equitable relief despite the absence of traditional requirements for relief under theories of assumpsit or constructive trust," Pet. App. 8a, and that "the State and County . . . disgorge the improperly collected taxes" to the Tribe, *id.* at 12a, is unprecedented. Not only does the Ninth Circuit's judgment have grave financial consequences for the State and County in this case, it is not necessary to vindicate federal law and establishes a precedent which could gravely harm the federal system.

As *amici* explain below, neither the traditional principles specific to the law of restitution nor general principles of equity jurisprudence support the Tribe's assertion that it is entitled to the taxes paid by Westmoreland. Under settled principles of the common law, even when a taxpayer itself brings a claim, the mere fact that "the tax authority collected money to which it was not entitled" is not a sufficient basis for a court to order restitution. 3 George E. Palmer, *The Law of Restitution* § 14.20, at 246 (1978). There is, of course, far less basis for a court to order such "restitution" when a non-taxpayer brings a claim. Even when the federal courts act in an area in which the Constitution grants them common law rulemaking powers, they do not have unlimited authority to fashion "remedies" for illegal state taxes. *See, e.g., United States v. California*, 507 U.S. 746, 751-56 (1993).[2] The judgment of the court of appeals should therefore be reversed.

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[2] *Amici* agree with petitioners that *United States v. California* requires reversal of the judgment below.

A. Under Traditional Principles Of Restitution, Montana And Big Horn County Have Not Been Unjustly Enriched

While the United States' and the Tribes' complaints alternatively cast their claims as "assumpsit for money had and received," Pet. App. 249a, or for the imposition of a "constructive trust," *id.* at 250a, at bottom their claims seek to require Montana and Big Horn County to pay over to them taxes collected not from the Tribe, but from a third party, Westmoreland Resources. Regardless of whether it is characterized as "assumpsit" or "imposition of [a] constructive trust," the Ninth Circuit's order that the State and County must "disgorge" the taxes to the Tribe sets a dangerous precedent that should be reversed.

The general principle that guides the remedies of assumpsit and constructive trusts—"that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money," *Moses v. MacFerlan*, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K.B. 1760)—has long been applied with particular restraint in cases involving illegal taxation. As a leading authority explains, "[t]he common law does not provide for restitution of tax payments simply because the tax authority collected money to which it was not entitled." 3 *Palmer on Restitution* § 14.20, at 246.

In recognition that the restitution of back taxes has great potential to disrupt the fiscal affairs of government, the common law interposes various preconditions on the granting of relief. The common law thus denies a taxpayer the right to recover illegal taxes paid under a mistake of law. *See id.* § 14.20(a), at 248; *Restatement of the Law of Restitution, Quasi*

Contracts and Constructive Trusts § 75, at 319 (1937) (comment a). Moreover, "[t]he generally stated common law rule is that there may be no recovery of taxes paid pursuant to legislation which is unconstitutional or otherwise invalid unless the tax was paid under duress." 3 *Palmer on Restitution* § 14.20(a), at 248; *Restatement of Restitution* § 75, at 322-23. *See also City of Philadelphia v. Collector*, 72 U.S. (5 Wall.) 720, 732 (1866); *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137, 153 (1836); *Bend v. Hoyt*, 38 U.S. (13 Pet.) 263, 267 (1839).[3] Even where protest has been made to a tax paid under duress, a taxpayer can waive that objection, thereby forfeiting the right to recover. *Elliot*, 35 U.S. (10 Pet.) at 157 (discussing *Greenway v. Hurd*, 4 Term 553, 100 Eng. Rep. 1171 (K.B. 1792)). Such claims are also barred by other equitable principles such as laches.

As these authorities demonstrate, the fact that a governmental entity imposes and collects an unconstitutional or illegal tax does not establish that the entity has been unjustly enriched—even at the expense *of the taxpayer*. Rather, in adjudicating taxpayer assumpsit actions, common law courts relied on equitable principles which acknowledged the government's substantial interest in avoiding disruption of its fiscal planning. The case for applying these principles is

[3] As the Court stated in *City of Philadelphia v. Collector*:

> Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received.

72 U.S. (5 Wall.) at 731-32.

even stronger here, where a non-taxpayer seeks to compel governmental entities to pay over to it taxes collected from a third party, notwithstanding that it was not in a fiduciary relationship with the taxpayer, who, under state law, had plain and adequate remedies to obtain a refund of the tax.

Recognizing as much, the United States now asserts that "[p]etitioners . . . incorrectly understand this case as one involving an independent cause of action for restitution, sounding in federal common law." U.S. Br. in Opp. 17. The Tribe's Fourth Amended Complaint, however, is denominated as a "Complaint for Restitution," Pet. App. 252a; both it and the United States' amended complaint assert as their causes of action assumpsit and creation of a constructive trust which are, of course, claims for restitution. *See id.* at 257a-259a; *see also id.* at 249a-250a (U.S. First Amended Complaint). That the United States now asserts that "[t]he relief granted to the Tribe is properly understood as an exercise of the broad equitable authority of the federal courts to remedy violations of federal law," U.S. Br. in Opp. 16, is not surprising as neither it nor the Tribe can cite a single case in which a court created a cause of action against a taxing authority for monetary relief in favor of a non-taxpayer third party. This is for good reason, as it would result in a dramatic expansion of government liability and seriously disrupt fiscal planning.[4]

[4] The United States asserts that it is incorrect that "the ruling of the court of appeals means that any person suffering injury as a result of an unlawful state tax imposed on a third party would have a cause of action under federal com-

Contrary to the assertion of the United States, the "equitable authority of the federal courts to remedy violations of federal law" is not so "broad" that it permits a federal court to create a remedy against the States out of whole cloth. *Cf. Lewis v. Casey*, 116 S.Ct. 2174, 2183-84 (1996); *Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995). Indeed, in a long line of cases implicating state tax authority, this Court has held that the federal courts generally may not grant either the traditional equitable remedy of an injunction or the more modern remedy of a declaratory judgment. *See, e.g., Matthews v. Rodgers*, 284 U.S. 521, 525-26 (1932); *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871).

To be sure, the common reason for denying a taxpayer injunctive relief is that paying a tax does not cause irreparable harm and that a refund provides an adequate remedy at law. *See, e.g., Dows*, 78 U.S. (11 Wall.) at 110. In this case, of course, the Tribe was not the taxpayer and thus could not pursue a claim for a refund absent Westmoreland's assigning its claim to the Tribe (which it did not do). Moreover, the absence of any precedent supporting the

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mon law for recovery of the taxes paid by the third party." Br. U.S. in Opp. at 17-18 n.9.

Whether the Ninth Circuit's holding would lead other courts to sanction a new category of claims against tax authorities by non-governmental entities is, of course, unknown. It is, however, a very small step from the Ninth Circuit's holding to such a result and it is reasonable to believe that lawyers would attempt to bring such claims.

What cannot be denied is that the holding below, by sanctioning suits for "disgorgement" by the United States against States and local governments, sets a dangerous precedent for the federal system. *See* pp. 18-21, *infra*.

notion that a non-taxpaying third party can sue a governmental entity for monetary relief should have made it obvious to the Tribe from the start that there was no adequate remedy at law and that its only remedy was to seek to enjoin the State from collecting the tax. Indeed, if Westmoreland had successfully pursued a refund claim under the procedures provided by Montana law, *see* Pet. 3 n.1, the State and County would have no "profits" to "return . . . to the Tribe." U.S. Br. in Opp. 14. Under such circumstances, the Tribe unquestionably could not pursue its assumpsit and constructive trust theories; only an injunction would have protected the Tribe's interest.[5]

The Tax Injunction Act, 28 U.S.C. § 1341, would not have precluded the Tribe from filing suit in federal district court to enjoin the State from collecting the tax upon its enactment. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 470-75 (1976); *cf. Department of Employment v. United*

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[5] That Westmoreland did not successfully pursue a refund claim cannot be the basis for allowing the Tribe's claims to go forward. The States must be able to rely on their statutes of limitations and the other preconditions to refunds (such as protest and exhaustion requirements) which have been imposed to protect their interest in fiscal planning. *See United States v. California*, 507 U.S. at 759. As the Court stated in *McKesson Corp. v. Florida*, 496 U.S. 18, 45 (1990):

> A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint . . . [and] enforce relatively short statutes of limitations applicable to such actions . . . .

It must also be noted that Westmoreland did not act as a fiduciary of the Tribe.

States, 385 U.S. 355, 358 (1966) (Tax Injunction Act inapplicable to suit by federal instrumentality to enjoin state tax). This much was made clear in *Moe*, which affirmed the decision of a three-judge district court rendered prior to the enactment of the coal tax, that upheld federal jurisdiction over a different tribe's suit to enjoin Montana from imposing its cigarette sales tax on reservation smoke shops. *See* 425 U.S. at 466, 470-75 (affirming 392 F. Supp. 1297, 1301-04). The Tribe thus cannot claim that its three year delay in pursuing an injunction was caused by uncertainty as to the remedy's availability.

Moreover, the Tribe's ability to protect its interest by seeking an injunction provides further reason to dismiss this action. It is, of course, well established that "[t]he rule allowing a person to recover money paid on the ground that the payment was under compulsion applies only where there is no other means of immediate relief, and therefore no avenue of escape from the threatened injury other than by making the payment." 66 Am. Jur. 2d *Restitution And Implied Contracts* § 114 (1973) (citations omitted); *see also* 72 Am. Jur. 2d *State and Local Taxation* § 1094 (1974) ("The rule has also been applied where the taxpayer might have obtained adequate relief by injunction or mandamus.") (citations omitted). If a taxpayer, who suffers out-of-pocket loss when it pays an illegal tax, is not entitled to restitution if it could have avoided the payment by obtaining an injunction, the Tribe, a non-taxpayer, should be barred from seeking "disgorgement."

B. There Is No Precedent For The Ninth Circuit's Disgorgement Order

The Ninth Circuit's order directing the district court to enter "an order directing the State and County to disgorge the improperly collected taxes" to the Tribe, Pet. App. 12a, is unprecedented. In *Crow IV*, the Ninth Circuit did not cite a single case which supports its holding that "the Tribe stated a claim for equitable relief despite the absence of traditional requirements for relief under theories of assumpsit or constructive trust." Pet. App. 8a. Instead, the court stated that it was merely reiterating its previous holding from *Crow III*. *See id.* In its *Crow III* decision, however, the Ninth Circuit likewise did not cite a single case which supports its novel remedy. *See* Pet. App. 59a-60a. There, too, the court asserted that the propriety of its remedy "was already addressed" in *Crow II*. Pet. App. 59a.

The court's decision in *Crow II*, however, did nothing of the sort, holding only that the tax was preempted by federal law and interfered with tribal sovereignty. *See* Pet. App. 90a-109a. The court's conclusion "that the taxes had at least some negative impact on the coal's marketability," *id.* at 100a, does not establish the Tribe's entitlement to the unprecedented remedy of requiring the State to pay over to it $58.2 million in taxes collected from a third party, which had no obligation to pay taxes to the Tribe. Many illegal taxes impose economic loss on third parties engaged in a commercial relationship with a taxpayer. The common law, however, has never recognized a cause of action by non-taxpayer third parties against the taxing authority for "restitution" of the economic loss caused by illegal taxes. *See* 84 C.J.S. *Taxation* § 631(b) (1954) ("A person is en-

titled only to a refund of taxes paid by him, and not to taxes paid by others.") (citations omitted); *see also id.* at n.5 ("The fact that the taxpayer waived his right to a refund does not entitle one who has not paid the taxes to it.").

The cases cited by the United States and the Tribe are reeds which are too thin to support the Ninth Circuit's holding. Citing *Ward v. Board of County Commissioners*, 253 U.S. 17 (1920), the United States asserts that "[t]here is nothing novel about the court of appeals' exercise of equitable authority to require petitioners to surrender the proceeds of their illegal taxes." Br. U.S. in Opp. 19. In *Ward*, however, the Indians were the taxpayers. *See* 253 U.S. at 18. They were thus entitled to recover the payment of illegal taxes that had been "made under compulsion." *Id.* at 24. The case thus stands for the entirely unremarkable proposition of the common law that if a taxpayer is compelled to pay an illegal tax, " 'he may recover it back . . . in an action of assumpsit for money had and received.' " *United States v. California*, 507 U.S. at 751 (quoting *Philadelphia v. Collector*, 72 U.S. (5 Wall.) at 732).

The United States also cites *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), for the "beyond debat[able]" proposition that "[t]he relief granted to the Tribe is properly understood as an exercise of the broad equitable authority of the federal courts to remedy violations of federal law." Br. U.S. in Opp. 16. *Porter*, however, does not support the intrusive relief awarded here.

The issue in *Porter* was whether a federal court had power to order a landlord to provide restitution of rents in excess of the legal maximum in a suit

brought by the Federal Government under § 205(a) of the Emergency Price Control Act of 1942, which authorized an "injunction, restraining order, or other order." 328 U.S. at 396-97. This Court held that "[a]n order for the recovery and restitution of illegal rents may be considered a proper 'other order' " under § 205(a) either because "[i]t may be considered as an equitable adjunct to an injunction decree" or as "an order appropriate and necessary to enforce compliance with the Act." *Id.* at 399-400.

Of note, the decree the Federal Government sought was to require the landlord "to tender to such persons as are entitled thereto a refund of all amounts collected by [the landlord] from tenants as rent . . . in excess of the maximum rents." *Id.* at 396-97. As the Court observed, the Federal Government in seeking such a decree merely "asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity." *Id.* at 402.

The Ninth Circuit's order that "the State and County . . . disgorge the improperly collected taxes," Pet. App. 12a, stands in stark contrast to the equitable relief which the Federal Government sought in *Porter*. Unlike the relief at issue in *Porter*, which, if granted, would restore the status quo, the Ninth Circuit's "disgorgement" remedy exceeds a federal court's equitable powers. It does not restore the status quo because the taxes were not paid by the Tribe but rather by Westmoreland (and its utility customers) and thus do not rightfully belong to the Tribe.

Moreover, even if the tax caused economic harm by diminishing coal sales and the Tribe's royalties, there

has been no proof as to the amount of lost royalties that is attributable to the tax. It might well be that the tax had only an insubstantial impact on the Tribe's royalties; in that event the Ninth Circuit's disgorgement order would not restore the status quo but rather would provide a windfall to the Tribe. Thus, even if an order of this sort (*i.e.*, a directive to a governmental entity to pay over taxes illegally collected to a non-taxpayer) is an appropriate exercise of federal equity jurisdiction, the Ninth Circuit's "disgorgement" order is contrary to the most fundamental principles of equity jurisprudence. And the order also violates this Court's instruction to the lower federal courts that in intergovernmental litigation, "[n]othing seems to us more appropriate than [showing] due regard for local institutions and local interests." *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343, 351 (1939) (action by U.S. to recover illegal taxes paid by Indian). *Porter* thus provides no support for this extraordinary order.

Equally unpersuasive is the Tribe's assertion that this "case is on all fours with" *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam). Br. Crow Tribe in Opp. 24. In *Snepp*, the Court upheld the imposition of a constructive trust on an ex-CIA agent's book profits because of the agent's violation of "his fiduciary obligations to the Agency" caused by his failure to submit the book for pre-publication review. 444 U.S. at 508. Snepp had signed an employment agreement under which he promised that he would not publish information regarding the CIA, both during and after his employment, without the Agency's prior approval. *Id.* at 507-08.

Even so, the Court did not lightly impose the "unprecedented and drastic relief" of a constructive

trust. 444 U.S. at 517 (Stevens, J., dissenting, joined by Brennan & Marshall, JJ.). Rather, it did so only after concluding that "Snepp explicitly recognized that he was entering a trust relationship" which "specifically imposed the obligation not to publish *any* information relating to the Agency without submitting the information for clearance." 444 U.S. at 510-11 (footnote omitted). The equitable remedy of a constructive trust was clearly necessary because "the actual damages attributable to a publication such as Snepp's generally are unquantifiable." *Id.* at 514. Moreover, the alternative of a tort suit for punitive damages would " 'require[] the revelation in open court of confirming or additional information of such a nature that the potential damage to the national security precludes prosecution.' " *Id.* at 515 (citation omitted). Noting that the remedy of a constructive trust was "the natural and customary consequence of a breach of trust," *id.*, that "[i]t deal[t] fairly with both parties by conforming relief to the dimensions of the wrong," *id.*, and that it was "tailored to deter those who would place sensitive information at risk," *id.*, the Court held that it was properly imposed on Snepp's book profits. *Id.* at 516.

The unique circumstances which led the Court to hold that the unprecedented and drastic remedy of a constructive trust could be imposed in *Snepp* are simply not present here. Montana does not have a trust relationship with the Tribe. Moreover, the Ninth Circuit's disgorgement order does not "conform[] relief to the dimensions of the wrong," 444 U.S. at 515, because there is no proof that the amount of tax the State collected from Westmoreland corresponds with the Tribe's lost royalties.

C. The Ninth Circuit's Remedy Is Not Necessary To Vindicate Federal Law And Could Gravely Harm The Federal System

Nor can the Ninth Circuit's remedy be justified as necessary to deter Montana and other States from imposing similar taxes. Here, for example, the State provided the taxpayer with a refund remedy for all tax years in question. Moreover, the Tribe could have sought an injunction in federal court upon the taxes' enactment. *See supra* at 11-12. Both the taxpayer and the Tribe thus had available ample procedures for challenging the tax; such procedures are more than adequate to deter the States from enacting unconstitutional taxes.

Indeed, sanctioning the Ninth Circuit's disgorgement remedy will only serve to unduly deter Montana and other States in the exercise of their legislative authority. As this case illustrates, the constitutionality of a proposed tax is not always readily determinable as a matter of black letter law.[6] Creating a disgorgement remedy against the States for taxes which are ultimately held to violate principles of federal Indian law is particularly troublesome given the at times complex and indefinite nature of the applicable jurisprudence. As the Court, in language fully applicable to this case, observed in *Cotton Petroleum*:

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[6] Indeed, Montana's coal severance tax was upheld against a challenge brought under the Commerce and Supremacy Clauses. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). And in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the Court upheld New Mexico's severance tax on oil and gas, which differed from the Montana tax only as to degree, against a challenge under the Indian Commerce Clause.

> [Q]uestions of pre-emption in this area are not resolved by reference to standards of pre-emption that have developed in other areas of the law, and are not controlled by mechanical or absolute conceptions of state or tribal sovereignty. Instead, we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case requires a particularized examination of the relevant state, federal, and tribal interests.

490 U.S. at 176 (internal quotations and citations omitted).

It will thus frequently be unclear to state officials whether a proposed tax will ultimately be upheld by the courts under federal Indian law. If a federal court can order a State to disgorge a tax (potentially with interest) many years after it has been collected and the actual taxpayer's claims have been resolved, state officials will be compelled to be overly cautious and forgo the enactment of taxes which ultimately would have been upheld.

Finally, the United States' assertions that "the ruling of the court of appeals reflects the application of well established general principles to the unique circumstances of the present case," Br. U.S. in Opp. 19, and that there is "no persuasive reason to believe that the ruling . . . is likely to have sweeping implications," *id.* at 21, are not credible. To the contrary, the holding below provides a foundation for other suits by the United States against States and local governments. For example, under the theory that the burden of an illegal state tax caused a taxpayer to default on its federal tax obligation, the United States could sue a State seeking "disgorgement." The United States could assert that it brought the suit

in its sovereign capacity and is thus not foreclosed by *United States v. California* and various state rules imposing statutes of limitation, requiring exhaustion of administrative remedies, and limiting refunds to actual taxpayers. *See* U.S. Br. in Opp. 15 (distinguishing *California* on ground that "the United States was not acting in its sovereign capacity when it agreed to reimburse the contractor for state taxes").

Such suits would, of course, pose a grave threat to the integrity of the States' tax systems and their fiscal planning.[7] The States' interest in relying on the conclusive effects of the decisions of actual taxpayers is equally compelling whether the United States brings a suit in its sovereign or proprietary capacity. *Cf. California*, 507 U.S. at 751-56 (rejecting Federal Government's assertion of a cause of action under federal common law to recover illegal state taxes paid by a contractor). Sanctioning the right of the United States to sue the States and their subdivisions to "disgorge" taxes collected from third parties could thus fundamentally undermine the federal system. *Cf. Metcalf & Eddy v. Mitchell*, 269

[7] Nor is it farfetched to think that if the United States' theories are credited, the States would attempt to bring similar claims against the Federal Government. For example, an illegal federal tax assessment might cause a taxpayer to default on its state tax obligation. Alternatively, in enforcing an illegal tax assessment, the IRS might seize a taxpayer's property. A State having a lien would thus be deprived of property in violation of the Fifth Amendment. *See Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 291 (1983). It seems unlikely that the United States would concede that a federal court's creation of a cause of action on behalf of the State to recover the tax or property merely "invoke[d] the remedial authority of the federal courts to remedy a violation of federal rights." U.S. Br. in Opp. 17.

U.S. 514, 523 (1926) (neither sovereign "may destroy the other nor curtail in any substantial manner the exercise of its powers"). The Court should therefore reverse the Ninth Circuit's extraordinary and unprecedented judgment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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